Nos. 523-530

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

UNITED STATES OF AMERICA, PETITIONER,

v.

FRANKFORT DISTILLERIES, INC.; NATIONAL DISTILLERS PRODUCTS CORPORATION; BROWN FORMAN DISTILLERS CORPORATION; HIRAM WALKER, INCORPORATED; SCHENLEY DISTILLERS CORPORATION; SEAGRAM-DISTILLERS CORPORATION; McKESSON & ROBBINS, INCORPORATED; J. E. SPEEGLE.

BRIEF OF THE STATE OF COLORADO, AMICUS CURIAE, IN OPPOSITION TO PETITION FOR CERTIORARI.

GAIL L. IRELAND,
Attorney General,

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State Capitol,
Denver 2, Colorado.

PEERLESS PRINTING COMPANY, DENVER

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BRIEF OF THE STATE OF COLORADO, AMICUS CURIAE, IN OPPOSITION TO PETITION FOR CERTIORARI.

The application for a Petition for Writ of Certiorari herein pending has been filed by the United States of America. The petition is a result of the Tenth Circuit Court of Appeal's decision and judgment in the case at bar wherein the United States of America sought to prosecute the Brown Forman Distillers Corporation and various other Distillers and local wholesale and retail liquor dealers

doing business in the State of Colorado, on a charge of violating the Federal "Anti-Trust" Laws. The Circuit Court of Appeals, among other things, concluded that the activities of the defendants as pleaded, was one necessarily intended to involve and affect only intrastate transactions and that it spent its direct and substantial force upon intrastate activities and that its effect, if any, on interstate commerce was indirect, insubstantial and incidental. The State of Colorado intervened as *Amicus Curiae* because of the direct effect of the prosecution upon the state's Liquor Code and Fair Trade Practice Act.

For inasmuch as the Attorney General of the State of Colorado has filed his brief and argument in the Circuit Court on behalf of the State of Colorado, and that Court has taken cognizance of the interests of the State in the outcome of the controversy at bar, we believe it appropriate and necessary on behalf of the State, to oppose the issuance of certiorari by this Honorable Court and request that it let the decision of the Tenth Circuit Court of Appeals stand as a final determination of the issues.

We have no further purpose or interest in this controversy between private individuals and the Federal Government. Our concern is solely over the proper line of demarkation between the authority of the federal government and the State of Colorado as it affects the system of our state control over intoxicating liquors which our citizens and legislature have chosen to adopt. We believe that the state's power to control sales of intoxicants within its borders is a purely local matter and that any decision to the contrary would disrupt, not only our state liquor code but the tax structure built upon it, 85% of which goes toward the payment of Old Age Pensions in Colorado. Accordingly we will confine ourselves to a restatement of the principal proposition advanced in the Circuit Court, namely:

THE STATE OF COLORADO HAS ENACTED SPECIFIC LEGISLATION REGULATING ALL LIQUOR SALES WITHIN ITS BORDERS.

Article XXII of the Colorado Constitution repeals the state prohibition law. That article was adopted by vote of the people at the General Election on November 8, 1932. Not being self-executing, however, it was necessary for the State of Colorado to enact a new code of liquor laws which in substantially its present form was enacted the following year and now appears as Chapter 89, Colorado Statutes Annotated, 1935. The Code sets up complete machinery for licensing and regulating the sale, use and consumption of liquors, wines and beer, both wholesale and retail, within the State of Colorado, and also imposes and levies an excise tax thereon, evidenced by "liquor stamps", which can only be sold to a manufacturer or a wholesaler. By that same token the Code makes the manufacturer or wholesaler liable for the payment of the tax in the first instance and it is unlawful for them to deliver any liquors, wines, or beer to the retailers for retail sale and disposition without first affixing the stamps to the containers or packages. Peculiarly enough, the stamps must remain uncancelled, the cancellation being left to the retail dealer or dispenser immediately upon his receipt of the article. We mention this system to illustrate the fact, that it is through control of the sale of liquor by the manufacturer or wholesaler that the State is able to enforce its police regulations and to collect its current excise revenue.

In addition to the Liquor Code, the State Legislature in 1937, enacted two statutes designed to stabilize retail prices on commodities throughout the State and to protect the retail trade from unscrupulous and destructive price cutting practices. We refer to these statutes as Chapter 146, Session Laws of Colorado, 1937, known as "Colorado Fair Trade Act" and Chapter 261, known as "Colorado Unfair Practices Law". Under the Fair Trade Act, it is made lawful for a dealer to contract, among other things, that he will not resale a commodity at less than

"the minimum price stipulated by the seller", and the commodity affected is defined as "any subject of commerce". The Colorado Unfair Practices law, *supra*, among other things, makes it unlawful for retailers, 1: To sell or offer to sell a commodity with an intent to destroy competition, and 2: To sell, offer for sale at less than cost or to give away an article to injure competitors and destroy competition.

As heretofore pointed out these Acts were deliberately designed to fix and stabilize minimum retail prices of commodities within the State of Colorado. We assume that the right of the State of Colorado to enact the same, as well as the fact that prices so fixed upon commodities in the field of local retail sales are excluded from the operation of the Sherman Act, has been too well established to require further argument.

In 1941, the Colorado Legislature passed an Act amending Section 17 of Chapter 89, 1935 Colorado Statutes Annotated (The State Code, *supra)*, by addition of a new sub-section as follows:

> "(t) To wilfully and knowingly advertise or offer for sale or sell any malt liquors, spirituous liquors and alcoholic beverages whether the person so advertising, offering for sale or selling is or is not a party to such contract, *at less than the price stipulated in any contract entered into pursuant to the provisions of the Fair Trade Act,* the same being Chapter 146, Session Laws of Colorado, 1937." (Italics are ours.)
>
> (Sec. 1, Ch. 160, S. L. Colo. 1941.)

The 1941 amendment, *supra*, was enacted so as to clarify any doubt but that retail liquor sales in the State of Colorado could lawfully be made the subject of fair trades contract for minimum price and thus bring the retail liquor dealers within the provisions of the Fair Trades Acts, the same as the druggist or other retail merchant

handling and dispensing imported standard branded products.

We deem it advisable to call the Court's attention to the fact that in Colorado, liquor sales constitute one of the chief sources of revenue, earmarked for the benefit of our old age pensioners and the system in Colorado providing for the collection of that revenue is built upon the absolute control by the state over manufacturers within the state and the wholesal importers. They are the only ones who can buy and affix the state liquor stamps. The state looks to and holds the wholesaler licensed by it accountable for the payment of the state excise tax thereon. Colorado, therefore, has a pecuniary as well as a regulatory concern in every wholesale sale of liquor imported within its borders. The retail purchases by the consumer from retail dealers who must purchase their stock from a Colorado licensed wholesaler to constitute a legal sale in Colorado, are wholly intra-state transactions.

We believe it was this phase of the factual presentation to the Circuit Court as well as the fact that the retail price maintenance applied to liquor no longer in interstate commerce—liquor which is, in fact, insulated from interstate commerce by provisions of Colorado law—which impelled the Court to deny jurisdiction of the Federal anti-trust laws over the controversy at bar. Any other interpretation would nullify the "Colorado Fair Trade Act" and its "Unfair Practice Law" which govern and regulate liquor sales within our borders and deny to Colorado the regulatory power granted the states under the 21st Federal Amendment.

CONCLUSION.

For reference we are supplementing this statement with an appendix consisting of copies of the pertinent portions of the Colorado Liquor Code and Regulations, setting up the machinery for the importation of intoxicants into Colorado, the taxing thereof, and the regulation and policing of local retail sales to the ultimate consumers. As al-

ready stated the state's prime concern is the effect of the controversy at issue upon its control over the article itself and the sale and traffic after the intoxicating beverages have been delivered within our borders for use and consumption in this state. The final judgment of the Circuit Court holds that these transactions as pleaded are wholly intrastate activities and that the second count of the Indictment "is completely barren of any allegations of fact effectively charging that the combination and agreement was one directly and substantially to restrict or burden the free and untrammelled flow of interstate commerce." The Court held also that the agreement "as pleaded was one necessarily intended to affect only intrastate activities." Such local liquor activities come within the provision of the Colorado laws. Any other conclusion would jeopardize our control over the intrastate liquor traffic and wreck the principal source of revenue for our Pension Fund.

The liquor sale regulations of the State of Colorado include specific requirements that intoxicating liquors produced outside of Colorado shall be the sole and exclusive property of the duly licensed Colorado wholesaler *when it crosses the Colorado State line* (see Regulation 12-C of the Appendix). *Such liquor must come to rest in the warehouse of the wholesaler* for the purpose of having state excise stamps affixed *before it can be sold or offered for sale within the state.* Retailers can purchase such liquor only from licensed Colorado wholesalers within the state. No wholesaler may own directly or indirectly any interest in a retailer nor may a retailer have any such interest in the wholesaler. We cannot visualize a situation in which the field of retail trade or complete local control is more definitely separated from interstate commerce.

We submit, therefore, that the final decision and judgment of the Circuit Court rendered in the case at bar is based upon the factual finding that no interstate commerce is involved. That such findings should not be disturbed and that there being no error of law appearing from the record

in the judgment and determination of the Circuit Court of Appeals in applying the law thereto, the writ of certiorari should and ought to be denied.

Respectfully submitted,

GAIL L. IRELAND,
Attorney General,
of the State of Colorado.

GEORGE K. THOMAS,
Assistant Attorney General
of the State of Colorado.

* * * * *

APPENDIX.
ARTICLE 2, LIQUOR CODE OF 1935.
(Chap. 89, Colo. Stat. Ann. 1935)

SECTION 15. This Act shall be deemed an exercise of the police powers of the State for the protection of the economic and social welfare, the health and peace and morals of the people of this State, but no provisions of this law shall ever be construed so as to authorize the establishment or maintenance of any saloon.

SECTION 16. On and after the effective date of this Act, it shall be lawful to manufacture and sell for beverage or medicinal purposes malt, vinous or spirituous liquors, subject to the terms, conditions, limitations and restriction contained in this Act.

SECTION 17. It shall be unlawful for any person:

(a) To manufacture, sell or possess for sale any malt, vinous or spirituous liquors, excepting in compliance with this Act.

(b) * * *

(c) * * *

(d) * * *

(e) * * *

(f) To manufacture for sale or sell malt, vinous or spirituous liquors unless licensed so to do as provided by this act and unless all licenses required hereunder, of him or it, are in full force and effect.

(g) For any person other than one who holds a license under this act to sell at retail any malt, vinous or spirituous liquors in sealed containers.

(h) To manufacture or sell at retail malt, vinous or spirituous liquors except in the permanent location specifically designated in the license for such manufacture and sale, or in such place to which a licensee may desire to move his or its permanent location. Such licensee may move his or its permanent location to any other place in the same city, town, or city and county for which the license was originally granted, or in the same county if such license was granted for a place outside the corporate limits of any city, town, or city and county, but it shall be unlawful to sell any malt, vinous or spirituous liquor at any such place until permission so to do shall be granted by all the licensing authorities herein provided for.

• • • • •

(i) For any person, the holder of a license to sell malt, vinous or spirituous liquors, to keep in his possession or upon the premises for which license is granted, any malt, vinous or spirituous liquors, the sale of which is not permitted by said license.

(j) • • •

(k) To have in his possession any package, parcel or container not bearing the excise tax stamps as may be required by this Act, or any of the within described containers on which the excise tax has not been paid to buy or re-use or to sell, transfer or give to any other person any alcoholic liquor container which has once been used on which is attached state excise stamps whether cancelled or not.

(l) To offer for sale or solicit any order for vinous or spirituous liquors in person at retail, except within his duly licensed establishment.

(m) For any retailer or consumer, to buy any vinous or spirituous liquor from any person not licensed to sell and deliver at wholesale or retail or serve the same as provided by this Act.

(n) • • •

(o) • • •

(p) • • •

(r) For any person, except a person licensed to sell at wholesale hereunder, or except as otherwise expressly provided herein, to buy the State excise stamps provided for in this Act from the State Treasurer, or sell or offer for sale any such stamp except such as is purchased directly from the State Treasurer, by such person, or to re-use any State excise stamp which has been once attached to a bottle or container, or to affix a State excise stamp over any Federal excise stamp or over any label.

(s) • • •

(t) To wilfully and knowingly advertise or offer for sale or sell any malt liquors, vinous liquors, spirituous liquors and alcoholic beverages whether the person so advertising, offering for sale or selling is or is not a party to such contract, at less than the price stipulated in any contract entered into pursuant to the provisions of the Fair Trade Act, the same being Chapter 146, Session Laws of Colorado, 1937. (Sub-sec. (t), Ref. Ch. 160, S. L. C. 1941.)

SECTION 18. Definitions—as used in this Act.

• • • • •

(p) "To sell" or "sale" means and includes any of the following: To exchange, barter or traffic in; to solicit or receive an order for except through a licensee licensed

hereunder; to keep or expose for sale; to serve with meals; to deliver for value or in any way other than gratuitously; to peddle, to possess with intent to sell; to possess or transport in contravention of this Act; to traffic in for any consideration promised or obtained directly or indirectly.

(q) "Sell at wholesale" means selling to any other than to the intended consumer of malt, vinous or spirituous liquors. The words "sell at wholesale" shall not be construed to prevent a brewer or wholesale beer dealer from selling malt liquors to the intended consumer thereof.

• • • • •

(v) "License" means a grant to a licensee to manufacture or sell malt, vinous or spirituous liquors as provided by this Act.

SECTION 19. Regulation and Control of Licensing.

For the purpose of regulation and controlling the licensing of the manufacturing and sale of malt, vinous, and spirituous liquors, as provided by this Act, there is hereby created the State Licensing Authority. The said State Licensing Authority shall consist of the Secretary of State. For the purpose of the efficient administration of the duties of the said State Licensing Authority, as hereinafter set out, the Secretary of State shall be the chief administrative officer, and the offices of the Secretary of State shall be the offices of the State Licensing Authority for the transaction of the business of the State Licensing Authority. The State Licensing Authority, with the approval of the Executive Council, may employ such clerks and inspectors, as may be determined to be necessary. The necessary expenses of said State Licensing Authority, and the salaries and expenses of the other employees, where here provided, shall be approved and fixed by the Executive Council.

• • • • •

SECTION 29. Licenses. For the purpose of regulating the manufacture and sale of malt, vinous or spirituous liquors, the State Licensing Authority may, in its discretion,

upon application in the prescribed form made to it, issue and grant to the applicant a license to manufacture, rectify or sell malt, vinous and spirituous liquors of the following classes, subject to the provisions and restrictions of manufacture and sale as to manner, place and license fee and as otherwise provided by this Act:

(a) Manufacturer's Liquor License

(b) Wholesaler's Liquor License

(c) Wholesaler's Beer License

(d) Retail Liquor Store License

(e) Liquor Licensed Drug Store

(f) Beer and Wine License

(g) Hotel and Restaurant License

(h) Club License

• • • • •

SECTION 31. Wholesaler's Liquor License.

(a) Wholesaler's Liquor License. Every person selling vinous or spirituous liquors at wholesale shall pay to the State Treasurer an annual license fee of One Thousand Dollars ($1,000.00) payable in advance.

(b) • • •

(c) Said license or licenses shall entitle the licensee or licensees to:

(1) Maintain and operate two warehouses and one sales room in this State to handle products so described in the above license or licenses, the same to be denominated a Wholesale Wine and Liquor Store or a Wholesale Beer Store or both, if required licenses have been provided.

(2) Take orders for vinous and spirituous liquors at any place and deliver vinous and spirituous liquors on orders previously taken to any place, provided the said license

has procured a Wholesale Wine and Liquor License, provided further, that the place where orders are taken and delivered is a place regularly licensed pursuant to the provisions of this Act.

(3) • • •

(4) • • •

SECTION 32. Retail Liquor Store License. Retail liquor stores as defined in this Act shall be licensed only to sell malt, vinous and spirituous liquors in sealed containers not to be consumed at the place where sold. Malt, vinous and spirituous liquors in sealed containers shall not be sold at retail other than in retail liquor stores, except as provided in Section 18-A of this Act.

• • • • •

SECTION 38. Excise Tax. (a) An excise tax of three cents (3c) per gallon or fraction thereof on all malt liquors, three cents per quart or fraction therof on all vinous liquors containing 14% or less of alcohol, and six cents per quart or fraction thereof on all vinous liquors containing more than 14% of alcohol by volume, and twenty cents per pint or fraction thereof on all spirituous liquors is hereby imposed, and shall be collected on all such respective liquor sold, offered for sale, or used in this State; provided, that upon the same liquors only one such tax shall be paid in this State. The manufacturer thereof, or the first licensee receiving alcoholic liquors in this State, if shipped from without the State, shall be primarily liable for such tax; provided, further, that if such liquor shall be transported by a manufacturer or wholesaler to a point or points outside of the State, and there disposed of, then in such event such manufacturer or wholesaler, upon the filing with the State Licensing Authority of a duplicate bill of lading or affidavit showing such transaction, the tax provided herein shall not apply to such liquor, and if already paid, shall be refunded to the manufacturer or wholesaler.

(b) The excise tax herein provided for shall be paid to the State Treasurer immediately upon delivery of the stamps, as provided for herein.

(c) All alcoholic liquors manufactured in this State, or sold therein, shall bear on the said container or containers, an excise stamp to be provided by the State Licensing Authority, which said stamp shall be affixed to all alcoholic liquors manufactured within this State by the manufacturer thereof before sale, or before being offered for sale, and all alcoholic liquors imported into the State immediately, upon entry therein, be affixed with the said excise stamp before being sold or offered for sale within the said State, and in accordance with the rules and regulations which may be promulgated by the State Licensing Authority, and provided also that all alcoholic liquors within the State, on the effective date of this Act, shall within a reasonable time thereafter, bear an excise stamp in the proper amount as provided herein.

(d) • • •

(e) The State Licensing Authority, after public hearing, of which the licensee shall have due notice as heretofore provided in this Act, shall suspend or revoke any license heretofore issued hereunder for a failure to pay any excise tax required by this Act, and may suspend or revoke such license for a violation of or for a failure to comply with the rules and regulations promulgated by said State Licensing Authority.

(f) • • •

SECTION 40. Disposition of Funds. The expenses of the State Licensing Authority shall be paid out of the funds and moneys collected from all license fees and excise taxes payable to the State Treasurer as provided by this Act, but the expenses of the office of State Licensing Authority shall not exceed five per cent of the sums or moneys so collected. All of the balance of said fees and excise taxes shall be

credited, distributed and paid to the Old Age Pension Fund in the manner now provided by law.

Of the funds and moneys collected from all license fees payable to the treasurer of any city, town, city and county or county, as provided by this Act, said city, town, city and county or county, may retain all of said license fees collected and paid to said licensing authority of said city, town, city and county, or county, to be credited to the respective general funds thereof.

SECTION 41. Violations and Penalty. Any person violating any of the provisions of this Act, or any of the rules and regulations authorized and adopted under it shall be deemed guilty of a misdemeanor and upon conviction shall be fined in the sum of not more than Five Thousand Dollars ($5,000.00) for each offense, or may be punished by confinement in the county jail for a term of not more than one year, or by both such fine and imprisonment, and the court trying such offense may decree that any license theretofore issued under the provisions of this Act or of any law relating to the sale of malt, vinous or spirituous liquors to such person operating the place of business in which said offense was committed be revoked, and may decree that no license for the sale of malt, vinous or spirituous liquors shall ever thereafter be issued to any such person convicted of such violation.

The penalties provided in this section shall not be affected by the penalties provided in any other section or sections of this Act but shall be construed to be in addition to any and all other penalties.

* * * * *

SECTION 45.

(a) * * *

(b) * * *

(c) * * *

(d) There shall be no property rights of any kind whatsoever in any alcoholic liquors, vessels, appliances, fixtures, bars, furniture, implements, wagons, automobiles, trucks, vehicles, contrivances, or any other things or devices used in or kept for the purpose of violating any of the provisions of this Act.

* * * * *

SECTION 48. This Act shall be known and may be cited as the "Liquor Code of 1935."

OFFICIAL RULES AND REGULATIONS PROMULGATED BY THE COLORADO STATE LICENSING AUTHORITY FOR ADMINISTRATION OF THE COLORADO LIQUOR CODE.

REGULATION No. 1.

Sec. 3. All malt, vinous and spirituous liquors sold or transferred within the State of Colorado must be affixed with the proper stamps before sale or transfer. Manufacturers, rectifiers and the first licensee receiving liquor within the State are primarily liable for the excise tax. Manufacturers and rectifiers shall affix the proper stamps to all liquors sold by them within this State to wholesalers, retailers or consumers prior to delivery. Wholesalers shall affix the proper stamps upon all liquors sold by them within this State to retailers or consumers prior to delivery. Manufacturers, rectifiers and wholesalers shall not affix stamps to liquor sold for resale or delivery outside the State of Colorado, but shipments of liquor sold for resale or delivery outside the State of Colorado must be accompanied by an inspection permit upon a form to be issued by the State Licensing Authority.

REGULATION No. 12.

Sec. C. It is hereby required that all alcoholic liquors and fermented malt beverages shall be the sole and exclusive property of and subject to the unrestricted power of disposal of a duly licensed Colorado wholesale liquor dealer

as defined in Section 17 of Chapter 142 or Section 5 (2) of Chapter 82, Session Laws of Colorado of 1935 at the time such liquors and malt beverages *cross the Colorado State line and are imported into this State for the purpose of being sold, offered for sale or used in this State.* (Italics are ours.) (Promulgated December 31, 1937.)

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529 *vs.*
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The United States of America, Petitioner,
530 *vs.*
J. E. Speegle.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[March 5, 1945.]

Mr. Justice Black delivered the opinion of the Court.

Respondents are producers, wholesalers, and retailers, of alcoholic beverages, who were indicted in a federal district court for having conspired and combined to restrain commerce in violation of Sec. 1 of the Sherman Act as amended. 26 Stat. 209; 50 Stat.

693. Their demurrers and motion to quash having been overruled, respondents pleaded nolo contendere to one count of the indictment. On these pleas they were adjudged guilty by the District Court and fined. 47 F. Supp. 160. The Circuit Court of Appeals reversed, on the ground that the indictment failed to show that the conspiracy charged was in restraint of interstate commerce. 144 F. 2d 824. The importance of the questions involved prompted us to grant certiorari.[1]

The indictment alleged that 98% of the spiritous liquors and 80% of the wines consumed in Colorado were shipped there from other states. The annual shipments into the state were 1,150,000 gallons of liquors and 800,000 gallons of wine. Seventy-five per cent of these beverages were handled by the defendant wholesalers. Respondents were charged with conspiring, in violation of the Sherman Act, to raise, fix and maintain the retail prices of all these beverages by raising, fixing, and stabilizing retail markups and margins of profit.

To accomplish the objects of the conspiracy, it is alleged that they adopted the following course of action. All of the respondents agreed amongst themselves to (1) discuss, agree upon and adopt arbitrary non-competitive retail prices, markups, and margins of profit; (2) defendant retailers and wholesalers agreed to persuade and compel producers to enter into fair trade contracts on every type and brand of alcoholic beverage shipped into the state, thereby to establish arbitrarily high and non-competitive retail markups and margins of profit, agreed upon by defendants; (3) the retailers were to prepare and adopt forms of fair trade contracts, and agree with producers and wholesalers upon these forms; (4) a boycott program was adopted by all of the defendants under which retailers would refuse to buy any of the beverages sold by wholesalers or producers who refused to enter into or enforce compliance with the terms of the price fixing agreements, and non-complying retailers would be denied an opportunity to buy the goods of the defendant producers and wholesalers. Machinery was set up to make the boycott program effective.

The facts alleged in the indictment, which stand admitted on demurrer, and on the plea of nolo contendere, indicate a pattern which bears all the earmarks of a traditional restraint of trade. The participants are producers, middlemen, and retailers. They have agreed among themselves to adopt a single course in making

[1] 323 U. S. —.

contracts of sale and to boycott all others who would not adopt the same course.

The effect, and if it were material, the purpose of the combination charged, was to fix prices at an artificial level. Such combinations, affecting commerce among the states, tend to eliminate competition, and violate the Sherman Act per se. *United States* v. *Socony Vacuum Co.*, 310 U. S. 150, 223-224. Price maintenance contracts fall under the same ban, *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 458, except as provided by the 1937 Miller-Tydings Amendment to the Sherman Act. 50 Stat. 693. The combination charged against respondents does not fall within this exception. It permits the seller of an article which bears his trade mark, brand, or name, to prescribe a minimum resale price by contract, if such contracts are lawful in the state where the resale is to be made and if the trademarked article is in free and open competition with other articles of the same commodity. This type of "Fair Trade" price maintenance contract is lawful in Colorado. Session Laws of Colorado, 1937, Chap. 146. But the Miller-Tydings Amendment to the Sherman Act does not permit combinations of business men to coerce others into making such contracts, and Colorado has not attempted to grant such permission. Both the federal and state "Fair Trade" Acts expressly provide that they shall not apply to price maintenance contracts among producers, wholesalers and competitors. It follows that whatever may be the rights of an individual producer under the Miller-Tydings Amendment to make price maintenance contracts or to refuse to sell his goods to those who will not make such contracts, a combination to compel price maintenance in commerce among the states violates the Sherman Act. *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 719-723. *United States* v. *Univis Lens Co.*, 316 U. S. 241, 252-253. Consequently, respondents were properly convicted, unless as they argue, their conduct is not covered by the Sherman Act, either because the price fixing applied only to retail sales which were wholly intrastate, or because the state's power to control the liquor traffic within its boundaries makes the Sherman Act inapplicable.

These two questions thus posed relate to the extent of the Sherman Act's application to trade restraints resulting from actions which take place within a state. In resolving them, there is an obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an inseparable ele-

ment of a larger program dependent for its success upon activity which affects commerce between the states. It is true that this Court has on occasion determined that local conduct could be insulated from the operation of the Anti-Trust laws on the basis of the purely local aims of a combination, insofar as those aims were not motivated by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce. The cases relied upon by respondents[2] fall within this category. All of them involved the application of the Anti-Trust laws to combinations of businessmen or workers in labor disputes, and not to interstate commercial transactions. On the other hand, the sole ultimate object of respondents' combination in the instant case was price fixing or price maintenance. And with reference to commercial trade restraints such as these, Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied; it "exercised all the power it possessed." *Apex Hosiery Co.* v. *Leader*, 310 U. S. 465, 495.

The fact that the ultimate object of the conspiracy charged was the fixing or maintenance of local retail prices, does not of itself remove it from the scope of the Sherman Act; retail outlets have ordinarily been the object of illegal price maintenance.[3] Whatever was the ultimate object of this conspiracy, the means adopted for its accomplishment reached beyond the boundaries of Colorado. The combination concerned itself with the type of contract used in making interstate sales; its coercive power was used to compel the producers of alcoholic beverages outside of Colorado to enter into price maintenance contracts. Nor did the boycott used merely affect local retail business. Local purchasing power was the weapon used to force producers making interstate sales to fix prices against their will. It may be true, as has been argued, that under Colorado law, retailers are prohibited from buying from out-of-state producers, but this fact has no relevancy. The power of retailers to coerce out-of-state producers can be just as effectively exercised through pressure brought to bear upon wholesalers as though the retailers brought such pressure to bear

[2] Industrial Association of San Francisco v. United States, 268 U. S. 64; Levering & Garrigues Co. v. Morrin, 289 U. S. 103; United Leather Workers v. Herkert & Meisel Trunk Co., 265 U. S. 457; cf. Local 167 v. United States, 291 U. S. 293, 297 and United States v. Hutcheson, 312 U. S. 219.

[3] See, e. g., Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373, 404; Ethyl Gasoline Corp. v. United States, 309 U. S. 436; United States v. Univis Lens Co., 316 U. S. 241, 244, 245.

directly upon the producers. And combinations to restrain, by a boycott of those engaged in interstate commerce, through such indirect coercion is prohibited by the Sherman Act.[4]

It is argued that the Twenty-first Amendment to the Constitution bars this prosecution. That Amendment bestowed upon the states broad regulatory power over the liquor traffic within their territories.[5] It has not given the states plenary and exclusive power to regulate the conduct of persons doing an interstate liquor business outside their boundaries. Granting the state's full authority to determine the conditions upon which liquor can come into its territory and what will be done with it after it gets there, it does not follow from that fact that the United States is wholly without power to regulate the conduct of those who engage in interstate trade outside the jurisdiction of the State of Colorado.

The Sherman Act is not being enforced in this case in such manner as to conflict with the law of Colorado. Those combinations which the Sherman Act makes illegal as to producers, wholesalers and retailers are expressly exempted from the scope of the Fair Trade Act of Colorado, and thus have no legal sanction under state law either.[6] We therefore do not have here a case in which the Sherman Act is applied to defeat the policy of the state. That would raise questions of moment which need not be decided until they are presented. The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

It is so ordered. Reversed.

The CHIEF JUSTICE took no part in the consideration or decision of this case.

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[4] Fashion Originators' Guild v. Federal Trade Commission, 312 U. S. 457, 465; Loewe v. Lawlor, 208 U. S. 274.

[5] Carter v. Virginia, 321 U. S. 131; Ziffrin, Inc. v. Reeves, 308 U. S. 132, 138; Young's Market Co., 299 U. S. 59.

[6] The Colorado Fair Trade Act, 1937 Col. Session Laws, Ch. 146, provides that under certain conditions sellers of commodities can contract with buyers not to resell, and to require subsequent purchasers not to resell, at less than the minimum price stipulated by the seller. But that Act specifically provides that it shall not apply to horizontal agreements, "to any contract or agreement between or among producers or between or among wholesalers or between or among retailers as to sale or resale price." The Colorado Unfair Practices Act, 1941 Col. Session Laws, Ch. 227, amending and reenacting 1937 Col. Session Laws, Ch. 261, makes it unlawful to sell goods below cost to injure or destroy competition, and states that the express purpose of the Act is "to safeguard the public against . . . monopolies and to foster and encourage competition."

Mr. Justice FRANKFURTER, concurring.

The Twenty-first Amendment made a fundamental change, as to control of the liquor traffic, in the constitutional relations between the States and national authority. Before that Amendment—disregarding the interlude of the Eighteenth Amendment—alcohol was for constitutional purposes treated in the abstract as an article of commerce just like peanuts and potatoes. As a result, the power of the States to control the liquor traffic was subordinated to the right of free trade across state lines as embodied in the Commerce Clause. The Twenty-first Amendment reversed this legal situation by subordinating rights under the Commerce Clause to the power of a State to control, and to control effectively, the traffic in liquor within its borders. The course of legal history which made necessary the Twenty-first Amendment in order to permit the States to control the liquor traffic, according to their notions of policy freed from the restrictions upon state power which the Commerce Clause implies as to ordinary articles of commerce, was summarized in my concurring opinion in *Carter* v. *Virginia*, 321 U. S. 131, 139.

As a matter of constitutional law, the result of the Twenty-first Amendment is that a State may erect any barrier it pleases to the entry of intoxicating liquors. Its barrier may be low, high, or insurmountable. Of course, if a State chooses not to exercise the power given it by the Twenty-first Amendment and to continue to treat intoxicating liquors like other articles, the operation of the Commerce Clause continues. Since the Commerce Clause is subordinate to the exercise of state power under the Twenty-first Amendment, the Sherman Law, deriving its authority from the Commerce Clause, can have no greater potency than the Commerce Clause itself. It must equally yield to state power drawn from the Twenty-first Amendment. And so, the validity of a charge under the Sherman Law relating to intoxicating liquors depends upon the utilization by a State of its constitutional power under the Twenty-first Amendment. If a State for its own sufficient reasons deems it a desirable policy to standardize the price of liquor within its borders either by a direct price-fixing statute or by permissive sanction of such price-fixing in order to discourage the temptations of cheap liquor due to cutthroat competition, the Twenty-first Amendment gives it that power and the Commerce Clause does not gainsay it. Such state policy can not offend the Sherman Law even though distillers or middlemen agree with local dealers to respect this policy. If an agreement

among local dealers not to buy liquor through channels of interstate commerce does not offend the Sherman Law though a like agreement as to other commodities would, an agreement among liquor dealers to abide by state policy for a uniform price—which is far less restrictive of interstate commerce than a comprehensive boycott—can hardly be a violation of the Sherman Law.

Thus the question in this case, as I see it, is whether in fact the policy of Colorado sanctions such an arrangement as the indictment charges. Such a policy may be expressed either formally by legislation or by implied permission. Unless state policy is voiced either by legislation or by state court decisions, it is precarious business for an outsider to be confident about the legal policy of a State. So far as our attention has been called to materials relevant for ascertaining the policy of Colorado toward such a price arrangement as is here charged, it would be temerarious to suggest that Colorado does sanction it. Indeed, the legislation of Colorado looks in the opposite direction. And we have no guidance from state decisions to suggest that the apparent condemnation of such an arrangement under the Colorado Fair Trade Act, § 2, Colo. Stat. Ann., ch. 165, § 20(2), does not condemn the price arrangements before us. Although the Attorney General of Colorado has filed a brief as *amicus curiae* on the side of the respondents, his argument is not based on the contention that the policy of Colorado sanctions that which it is claimed the Sherman Law forbids. In the view I take of the matter, if a State authorized the transactions here complained of, the Sherman Law could not override such exercise of state power. For in any event, if state policy did so authorize it, conformity with the state policy could not be deemed an "unreasonable" restraint of interstate commerce. But I do not find that Colorado has done so.

The decision of the court below is not without support in what has been said in the past in holding that, apart from the Twenty-first Amendment, this was a restraint local in its nature and therefore outside the scope of the Sherman Law. But price-fixing is such an immediate restraint upon trade that I do not think that the reach of the consequences of such an obvious restraint should be determined by drawing too nice lines as a matter of pleading. The case is before us, in effect, on demurrer to the indictment and judged abstractly, as a matter of pleading, I cannot say that the indictment was demurrable.

Mr. Justice ROBERTS concurs in this opinion.